DATIN HAJJAH ZALEHA & ORS. v. PERKASA TRADING SDN. BHD. & ANOR.

[F.C. (Salleh Abas L.P, Lee Hun Hoe C.J. (Borneo) & Seah F.J.) May 7 & August 7, 1984]

[Kota Kinabalu – Federal Court Civil Appeal No. 76 of 1983]

Practice and Procedure – Appeal – Order made in Chambers – Certificate of Judge that no further argument was required – When time for appealing from order runs – R.F.C. 1980, r. 56(a).

In this case the applicants had applied that an order of Court be set aside on the ground that the 1st respondent had failed to serve notice of the proceedings on the appellants. The application was dismissed on January 17, 1983. The solicitor for the applicants applied for further argument in court but the learned judge certified on January 21, 1983 that he required no further argument. The applicants' solicitor was duly informed of this by the Assistant Registrar by letter on February 7, 1983. Notice of appeal was filed on March 4, 1983. Counsel for the respondents submitted that the notice of appeal was delivered out of time and that the period of one month should run from the issue of the Judge's certificate. The applicants on the other hand argued that the one month's period should be computed from the date of the Assistant Registrar's letter informing the solicitor for the applicants that no further argument was required by the learned Judge. The applicants nevertheless applied for leave to appeal under rule 56 of the Rules of the Federal Court, 1980.

Held, as the one month would begin to run from the date of the Assistant Registrar's letter viz. February 7, 1983, the notice of appeal was delivered within the time limit and no application for leave was necessary.

Cases referred to:

(1) *Bank of America National Trust & Savings Associations* v. *Chai Yen* [1980] 1 M.L.J. 198.

(2) *Tractors Malaysia Bhd.* v. *Southern Estates Sdn. Bhd. & Anor.* [1984] 1 M.L.J. 118.

FEDERAL COURT.

Abdul Razak Rouse for the applicants.

C.I. Robertson for the 1st respondent.

Mokhtar bin Haji Sidin, (Senior Federal Counsel) for the 2nd respondent.

Cur. Adv. Vult.

Seah F.J. (delivering the Judgment of the Court): This is an application under Rule 56 of the Rules of the Federal Court 1980 for leave to appeal and it is supported by an affidavit affirmed by Abdul Razak Rouse, solicitor for the applicants/appellants dated October 31, 1983. The relevant facts may be shortly stated.

By Originating Summons No. K 129 of 1981 the appellants prayed that the Court Order of July 6, 1981 in Originating Summons No. K 45 of 1981 be set aside on the grounds that the 1st respondent herein failed to serve notice of the proceedings on the appellants as the parties affected which resulted in the non-disclosure of the full facts of the matter. The application was dismissed with costs on January 17, 1983. On January 18, 1983 solicitor for the appellants applied for further argument in open court under section 68(2) of the Courts of Judicature Act 1964 (as amended). The learned judge certified that he required no further argument on January 21, 1983 and the appellant's solicitor was duly informed of this by the Assistant Registrar by letter on February 7, 1983. Notice of appeal was filed on March 4, 1983.

Counsel for the 1st and 2nd respondents had submitted that the notice of appeal was delivered out of time and that the period of one month should start to run from the issue of the Judge's Certificate, viz. January 21, 1983. For the appellants it was argued that since the date of the Judge's Certificate differed from the date of the Assistant Registrar's letter informing the solicitor for the appellants that no further argument was required by the learned judge, the one month's period should be computed from the date of the letter.

We prefer the submission of counsel for the appellant which seems to be supported by a decision of the Privy Council in the case of *Bank of America National Trust & Savings Associations* v. *Chai Yen*[1]. In that case, the Privy Council had to consider Rule 13(a) of the Federal Court (Civil Appeals) (Transitional) Rules 1963 [see the former Rule 56(a) of the Rules of the Federal Court 1980] and Order 54 Rule 22A of the Rules of the Supreme Court 1957 [now Order 56 Rule 2(2) of the Rules of the High Court 1980] and in giving the judgment of the Privy Council Lord Lane (now Lord Chief Justice of England) said at page 200:

". . . . . in the case of an order made in chambers in which an application under Order 54 Rule 22A has been lodged within the time allowed, the time for appealing under Rule 13(a) runs from the date when the judge's decision not to require further argument is communicated to the applicant and not from the date of his original order."

In our judgment, such a construction would appear to be in accord with the last limb of Rule

56(a) of the Rules of the Federal Court 1980. The fallacy of the respondents' argument can be tested in this way: what happens if the Assistant Registrar send the Judge's Certificate on February 20? Does that mean that the one month should be construed as from January 21, leaving to the appellant only one day to file the notice of appeal? To take another extreme case. What happens if the Assistant Registrar were to despatch the Judge's Certificate after the one month's period, say on February 25? Obviously, if we were to accept the contention of the respondents, any appeal filed by the appellant would be out of time, and application would have to be made to the full Federal Court for leave to appeal.

Now, the amended Rule 56 reads:

"56. No appeal shall, except by leave of the full court, be brought after the expiration of one month –

(a) in the case of an appeal from an order in chambers, from the date when such order was pronounced *at the hearing or after the hearing in open court or after the issue of the certificate by the judge that he requires no further argument, whichever is the later* or when the appellant first had notice thereof;
[The amended parts are italicized)

(b) .....

(c) ....."

Although Rule 56(a) was amended on August 1, 1980 by P.U. (A) 222/80 [see *Tractors Malaysia Bhd.* v. *Southern Estates Sdn. Bhd. & Anor.*(2)], in our opinion, the result would still be the same. Applying this to the facts of this case, we would rule that the one month would begin to run from the date of the Assistant Registrar's letter, viz. February 7, 1983. Since the notice of appeal was filed on March 4, 1983 we hold that it was delivered within the time limit and that the application for leave to appeal was in fact not necessary. We therefore strike out the Notice of Motion and order that each party do pay its own costs.

Order accordingly.

Solicitors: *Rayner & Co.; Skinner Lind Robertson Pang & Willie.*

KHAN KAM CHEE v. LOKE WAN YAT REALTY SDN. BHD.

[F.C. (Abdul Hamid C.J. (Malaya), Wan Suleiman and Abdoolcader F.JJ.) June 4 & August 8, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 221 of 1983]

Practice and Procedure – Action for breach of contract – Option to purchase property – Partnership formed and rights assigned to partnership – Champertous agreement – Abuse of process of Court – R.H.C. 1980, O.33, r.5.

Contract – Champertous agreement – Civil Law Act, 1956, s. 3.

The appellant alleged that by a written agreement made on 21.3.1973 the respondent in consideration of the payment of $2,000/- by appellant granted to him an option to purchase part of the respondent's land. The option was exercisable within two months from the date of the agreement and was renewable for a further period of two months on payment of a further sum of $2,000/-. The appellant paid the sum of $2,000/- being consideration for the grant of the option on 27.3.1973. The respondent purported to repudiate the agreement on 9.4.1973 and returned the $2,000/- but appellant refused to accept the repudiation. On 18.5.1973 he paid to the respondent a further sum of $2,000/- to extend the option for two months from 20.5.1973. On 12.7.1973 the appellant entered into an agreement with one Teh Seng Kian whereby they agreed to enter into a partnership. On 18.7.1973 solicitors for the appellant informed the solicitors for the respondent that the appellant was ready to exercise the option and on 19.7.1973 the deposit of $616,000/- was paid. Since the respondent refused to sell the land to the appellant, the appellant brought an action for specific performance in his personal capacity. The defence was that the prosecution of the action in furtherance of a partnership agreement and to implement a champertous agreement constituted an abuse of the process of the court and should be dismissed on the ground that it was against public policy. The preliminary issues raised in the Statement of Defence was heard and the action was dismissed in the High Court. The appellant appealed.

Held: (1) the partnership agreement was a champertous agreement and the respondents were entitled to rely on this as a defence;

(2) quite apart from the question of champerty, the appellant in this case by entering into the partnership had divested himself of his right to sue in his personal capacity.

Cases referred to:–

(1) *Skelton* v. *Baxter* [1916] 1 K.B. 321.
(2) *Martell* v. *Consett Iron Co. Ltd.* [1955] 2 W.L.R. 463, 491.
(3) *Laurent* v. *Sale & Co.* [1963] 2 All E.R. 63.
(4) *Varma & Anor.* v. *Oli Mohamed* [1950] M.L.J. 80.
(5) *T.C.S.* v. *Director General of Inland Revenue* [1977] 2 M.L.J. 212.